SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 30

WILLARD IRWIN SINGER AND MARTIN H. SINGER,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOHN W. CRAGUN,
Counsel for Petitioners.

WILLIAM STANLEY,
Of Counsel.

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No. 708

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THE UNITED STATES OF AMERICA.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Willard Irwin Singer and Martin H. Singer,[1] by their attorney, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause on November 29, 1943.

[1] An additional party, Walter William Weel, was a co-defendant in the indictment and a party to the appeal below. He is not a party to this petition. Counsel for petitioners has not been advised whether Weel will file a separate petition to this Court.

Opinions Below.

The District Court of the United States for the Western District of Pennsylvania (Gibson, D. J.) rendered an opinion (R. 4) which is reported in 49 F. Supp. 912. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 146, *per curiam*, Biggs, Goodrich and McLaughlin, JJ.) is not as yet reported.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered November 29, 1943 (R. 147). Petition for rehearing was entertained, and was, on January 12, 1944, denied (R. 152). The statutory provision believed to sustain the jurisdiction of this Court is § 240 (a) of the Judicial Code as amended. See also Rule XIII of the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934. Excluding Sundays (January 16, 23 and 30; February 6 and 13) and Lincoln's Birthday (February 12), if it be a holiday in Pennsylvania,[2] time for filing the petition extends to February 17, 1944.

Questions Presented.

1. Whether petitioners are guilty of conspiracy to violate Sec. 11 of the Selective Training and Service Act of 1940.

2. Whether conspiracy to violate Sec. 11 of the Selective Training and Service Act of 1940 in respects other than to "knowingly hinder or interfere in any way by force or violence with the administration of this Act" is punishable

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[2] Title 44, Purdon's Penna. Stats. Ann., § 11, places Lincoln's Birthday on the same plane with July 4th, Christmas, etc. However, it appears from the Pennsylvania statute that such days may be "legal holidays" only as respects some incidents in connection with certain negotiable instruments, etc.

under the terms of Sec. 11 of that act, or under the general conspiracy statute, Sec. 37 of the Criminal Code (18 U. S. C. § 88)—and, therefore, whether an overt act need be alleged.

Statutes Involved.

Sec. 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894-5, 50 U. S. C. App. §311, provides, as follows:

> "Sec. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, *or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so,* shall, upon conviction in the district court of the United States having jurisdic-

tion thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court marital under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act." (Italics added)

Section 37 of the Criminal Code, 18 U. S. C. §88, provides, as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Statement.

Petitioners, father and son, were indicted in the United States District Court for the Western District of Pennsylvania, together with one Walter William Weel, for conspiracy to evade service in the armed forces as required by the Selective Training and Service Act of 1940; they were convicted and sentenced; the judgment was affirmed by the court below. The indictment did not charge the commission of an overt act.

Petitioner, Willard Irwin Singer, is a lawyer who had up to the time of his indictment been practicing his profession in Pittsburgh, Pennsylvania (R. 81-2). Petitioner, Martin H. Singer, Willard's father, is a man of slight education

who was engaged in the women's dress business until wiped out in the depression and forced to close in 1933 or 1934 (R. 131). After Martin, the father, closed his business, Martin and his wife, Elizabeth, had no income of their own, but were dependent upon their son, Willard, for their support (R. 132-3). From that time to the date of trial Willard had paid all of the household and other living expenses of his parents. (R. 85-87, 133-136; Exhibit 5, file of papers taken from the local draft board file of Willard, particularly Exhibit C attached to the brief of Willard I. Singer filed with the local board.)

In addition to the practice of the law, Willard had certain properties which he owned and managed. One of these was Martin's Grill, Inc., a corporation of which he was the sole stockholder (R. 83). The principal facts relied upon by the Government for conviction were based upon the affairs of this corporation. This business, a restaurant business, commenced operations in about July, 1937 (R. 83). It had never been a money-making proposition, but had lost money from the outset and down to the date of the trial (R. 83-4). Martin, who had been without an occupation since 1934, came to the grill from day to day, so far as he was able, from about the time the grill opened and did what he could to help look after his son's interest in the grill. R. 83, 134, *et seq.* Willard, the son, came in the evenings and conducted the affairs of the grill and always acted as manager of the company (R. 97).

Martin was not in good health (R. 135-6). His limited experience apparently fitted him for no regular occupation and at the time of the trial he was 58 years of age (R. 83, 132). Not unnaturally, he did, however, when opportunity offered through the opening of the grill, devote time and attention to attempting to salvage his son's investment. That he was never regarded as an employee of the grill is shown by the fact that he was never paid wages or a salary

(R. 85, 135),[3] notwithstanding the fact that the payment of a salary and deductions for social security would have stood to relieve Willard of some of the burden of support of his father since Martin would have become eligible for old-age benefits under the Social Security system.

Under the Selective Service system Willard filled up the usual questionnaire (Exhibit 1) in which he claimed his father and mother as dependents and claimed that his wife, although employed at a salary, was partially dependent upon him. There has been no contention by the government in this case that the mother, Elizabeth H. Singer, was not totally dependent upon her son, or that his wife, Florence King Singer, was not partially dependent upon him, or that he did not with his wife maintain a bona fide family relationship in their home. Thus, far, then, it is clear that under the selective-service rules and regulations in effect at the time (June, 1942) Willard could properly have been classified only III-A.[4] The contention, however, is that in

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[3] To prove that Martin actually had received a salary, the government introduced the transcript of testimony of Martin in the hearing on appeal from an order of the Pennsylvania Liquor Control Board, October 28, 1940. Government Exhibit No. 7. This transcript was scarcely fairly dealt with below; for while it is true, in answer to a final question of the cross-examiner, that Martin answered "Yes" to the question "Does he [Willard] pay you a salary?"—still he testified as to his employment at the grill only that "I would say in a way I am employed," and in answer to the question "What is your connection with Martin's Grill?" he replied, "No connection except that I go over there and look over some matters for Willard." But however Martin may have regarded his employment at that time (October, 1940), it is plain that he never did actually receive a salary; and there was no pretense at the trial that he had done so. Not only is the testimony of petitioners unrefuted, but it may well be assumed that if the contrary were true, it would have been developed from the books, records, checks, returns, etc., of the corporation during the investigation of this case by the F. B. I.

[4] See the charge in the District Court in the transcript of testimony filed with the clerk, wherein the jury was told that to be a dependent of a registrant a person must be the wife or child of the registrant with whom the registrant maintains a bona fide family relationship in their

claiming the father as a dependent Willard acted to secure an improper III-A deferment for dependency. His father filed two affidavits of dependents (Gov't Exhibits 2 and 3) which were alleged to have identified him in this conspiracy.

The facts were fully set up before the local board upon a hearing after it had classified Willard in Class I-A (Gov't. Exhibit 5); and Willard at that time made a full disclosure to the board of his father's work at the grill—even bringing in his social-security returns to prove that his father had received no income from what he did for the grill (R. 96-7); Gov't. Exhibit 5 (and Exhibit G attached to Gov't. Exhibit 5). One of the board members knew of Martin's work at the grill before the hearing held June 9, 1942; and though he disqualified himself from sitting in the case he had suggested to Willard before the hearing of June 9, 1942, the advisability of supporting his assertion that his father had not received income from his occupation at the grill (Testimony of Willard I. Singer on rebuttal in the transcript of testimony in the record before the court below, p. 187-8.[5]).

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home, or, if a parent, must depend for support upon the registrant or be a person of any age physically or mentally handicapped whose support the registrant has assumed in good faith.

It is believed that the District Court may have inadvertently used the definition of "dependent" from the regulations under the Selective Training and Service Act of 1940 as they existed at the time of the trial rather than as they existed at the time the alleged offense took place (June, 1942). The Selective Service Rules and Regulations (§ 622.32) provided in June, 1942, that a wife or parent must depend for support upon the registrant, and provided that reasonable doubts as to dependency should be resolved in favor of the dependency. See 6 Fed. Reg. 6609. The regulations were amended July 11, 1942—about one month after Willard's hearing—to provide in accordance with the charge of the District Court. 7 Fed. Reg. 5343. The change in regulations is, of course, immaterial here, since Willard properly would be classed III-A under either set of regulations.

[5] The record was not printed in the court below, under its rule requiring partial reprints of testimony by each party as an appendix to the respective briefs. The printed record which accompanies this petition for certiorari is comprised of certified copies of these appendices to briefs, plus the

Viewed in the most charitable light, however, the board's memory must have become faulty; for, apparently disregarding the fact that full disclosure as to Martin's working at the grill had been made, numerous F. B. I. agents, apparently at the instigation of the board, in the months following that hearing undertook to go to the grill and discover that the father, Martin, was engaged there in tending the cash register, chatting with customers, making sandwiches, tending the bar, swatting flies, etc.—as he could be useful (R. 38-39, 43-46, 34-36, 47-69).

The representatives of the government, then, instituted his prosecution on the theory that Willard and Martin had falsely represented that the father was *not employed.* As a matter of fact, as shown above, it had never been any secret before the local board that the father was engaged in helping out around the grill. The only question before the board had been whether, notwithstanding that occupation, he was actually *dependent* upon Willard. So far as Willard and Martin are concerned, the Government's theory at the trial, at least initially, rested upon this same misapprehension that petitioners had represented that the father did *not work,* instead of that he did work but had received no income from it and had always actually been *dependent* upon Willard (R. 21). The testimony that Willard had represented his father as not employed, however, was vitiated in the cross-examination of the member of the board who gave it (R. 25-6).

An unrelated and different problem was posed with respect to Walter William Weel. Weel had been engaged in the business of selling coal for some 19 years (R. 115).

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proceedings in the court below (R. 152). However, under stipulation of the parties filed with the clerk, the entire record and original exhibits as filed with the court below have been lodged with the clerk of this Court and may be referred to on this petition by either party. For the hearing on the merits should certiorari be granted, a somewhat fuller and better record will be printed.

Commencing in the fall of 1940, he engaged Willard Singer to assist him in connection with an enterprise whereby he would open certain strip coal mines in Pennsylvania and become a coal producer (R. 115-116). Since, apparently, the business of operating a strip mine is in considerable part a matter of proper contract arrangements and litigation, Weel agreed to underwrite the financial side of the operation and to pay Willard Singer 25% of the net profits of the operation for the latter's services in drafting contracts for truckers, for leases for stripping equipment, and for the truckage and delivery of the coal on rail contract (R. 116, 130), handling the litigation, making a thorough search of the law, etc. (R. 92).

Willard Singer apparently did not regard his services for Weel as affecting his classification with the Selective Service system. At no time did he make any request for deferment based on these facts (R. 107). The hearing before the local board was held one or two days before or after Weel returned from an extended business trip to Chicago (R. 128). Weel learned of Willard's 1-A classification and thereafter got in touch with the Coal Commission Board in Pittsburgh (R. 126) about the matter of securing a deferment for Singer and then, from a folder which the National Coal Association had sent to members of the Western Pennsylvania Coal Operators' Association detailing what the members should do to get "necessary-man" deferments, Weel prepared an affidavit to support claim for occupational deferment (which claim Willard had not made) and sent it with a letter to the local board (R. 130, Gov't Exhibit 4). He did not consult Willard Singer in the preparation of this affidavit but followed the form which had been furnished to him (R. 95, 119). Weel had graduated from law school and there is no inherent reason to doubt his ability to follow the instructions sent by his association in this respect (R. 122-3). That he was not as-

sisted by Willard was proved by independent testimony (R. 142-4). At the same time, it must be admitted that his allegations as to the nature of the employment and irreplaceability of Willard Singer (Gov't Exhibit No. 4) went probably too far in the claims respecting Singer's connection with Weel's business. These claims as to Singer's essentiality were apparently based on nothing more than that Singer had made a special study of the mining law as it affected Weel's operation, was completely acquainted with the three stripping operations that had been undertaken and other leases which had been made, and had taken some part in making arrangements for the disposal of the coal which, at the time the claim for deferment was made, they reasonably expected to produce (R. 94). For it seems apparent that any other competent lawyer with the same amount of study could have qualified to take care of the litigation and contracts. Perhaps Weel's statements in the claim for occupational deferment were not false, considering the status of his business at the time they were made; perhaps he was only selfishly considering his own business interests. But even if they were outright false statements, still there is no basis for inference that either of the Singers participated in the scheme of Weel to secure the deferment; neither of them at any time advanced this claim, and Willard had not even mentioned his employment by Weel in his questionnaire.[6] If, therefore, Weel's statements are false, he can be prosecuted for them. But an indictment for conspiracy should not be made the vehicle where Weel alone is responsible and can be punished for his wrong.

The trial was held on the first anniversary of Pearl Harbor (R. 8). The jury found all three defendants guilty.

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[6] The prosecutor seems, from his cross-examination of Willard, somewhat petulant over the fact that Willard had *not* supported Weel's claim in Willard's own questionnaire (R. 107-8). Manifestly, if there were a conspiracy on the point, there would have been a concert of action on the part of Singer as well as Weel to secure the occupational deferment.

Specification of Errors to be Urged.

The court below erred, as follows:

1. In sustaining the judgment of conviction.

2. In failing to reverse the judgment of conviction for failure of the District Court to grant the motion for directed verdict on grounds of insufficient evidence.

3. In failing to reverse the judgment of the District Court for its error in overruling defendant's motion in arrest of judgment.

4. In failing to reverse the judgment of the District Court for its error in overruling demurrers to the indictment for failure to allege the commission of an overt act.

Reasons for Granting the Writ.

1. Petitioners are not guilty. The facts are set out in the statement, *ante*. Probably the faulty recollection of the local board as to the representations of Willard was the reason for the prosecution;[7] but when the member of the board (Hirsch, R. 19-26) who had testified boldly and positively to the alleged misstatements of Willard the night of his hearing to the effect that Martin had no employment whatever, broke completely in his testimony on cross-

[7] At the same time, even if the theory upon which this prosecution was founded were proven correct, this case is not remotely as serious as others prosecuted for conspiracy to violate § 11 of the Selective Training and Service Act of 1940. Here, as we have shown above, notwithstanding the representations as to Martin's dependency, Willard would properly have been placed in III-A if the regulations were followed. In the case of *United States* v. *O'Connell* (C. C. A. 2d, 1942), 126 F. 2d 807, dealt with in point 2, below, there was a conspiracy with the head of a local draft board to pay a selective-service investigator a bribe of $1000 to return a favorable report on the deferment of a registrant. In *United States* v. *Offutt* (1942), 75 App. D. C. 344, 127 F. 2d 336, also dealt with in point 2, the conspiracy was to have the registrant wilfully fail to report for induction.

examination, the district attorney ought to have reconsidered his case, consistently with his obligations defined in *Berger* v. *United States*, 295 U. S. 78, 88. On cross-examination this member recalled that the employment of Martin Singer had been a subject of discussion; that the board had had before it the social-security records of the grill and that their only concern at that time was whether there was any income to Martin Singer or not—"that was the thing we were particularly interested in; whether he went there and was unpaid, we were not interested. We were trying to ascertain whether this man had an income; that is the only thing we were interested in". The other member who heard Willard Singer the night of the hearing likewise testified (R. 27) that the question of the father's employment had been discussed.

Nonetheless, the district attorney paraded before the jury no fewer than eleven witnesses, some of them F. B. I. agents, to prove that Martin Singer performed some duties in the grill and was seen there at various hours between noon and 2 a. m. That is to say, when the theory upon which the trial had been instituted—*i. e.*, that Martin Singer had been represented as not working—was proved by the prosecution witnesses themselves upon cross-examination to have a misapprehension, nevertheless, the jury was permitted to have this erroneous theory buttressed and reinforced through the testimony of numerous witnesses. Beyond doubt Martin Singer never received any income from his employment at the grill. Beyond doubt after the grill opened, just as before, he relied for the necessities of life upon his son. No effort was made by the government to disprove these facts and the facts themselves are proved beyond any possible cavil. Even the courts below seemed far more concerned with the question of the failure of the indictment to plead an overt act than with the reality of the substantive offense alleged. The opinion of the Third Cir-

cuit Court of Appeals was devoted exclusively to the question of pleading an overt act in an indictment, the court regarding the questions whether petitioners were guilty "do not require discussion" (R. 146).

It is entirely consistent with Willard's lack of guilty intent in this situation that for some time prior to the date of his reclassification by the board—and indeed in the months following the hearing of June 9, 1942, and prior to his indictment—he persistently attempted to secure a commission in the various branches of the armed services (R. 101-3). He was not, as in the recurrent cases of conscientious objectors and alleged ministers of the gospel which are filling the reports on Selective Service violations, attempting to avoid any service to his country in its time of peril. It is true that he asked for a commission in the armed services because his experience, education and age satisfied the usual qualifications required *in limine* for service as a commissioned officer; and by reason of his financial position and the consistent losses he had suffered in the affairs of the grill he had hoped better to be able to conserve his personal estate and take care of his family on the somewhat larger compensation of a commissioned officer (R. 104-5). After he was indicted he made outright attempt to enlist (R. 106). In these circumstances it is difficult to understand what possible purpose of the Selective Service system is served in the prosecution of this registrant for attempt to evade the law, thereby preventing his induction.

There can be no doubt that this Court may consider the question whether petitioners can properly be held guilty under this evidence. Despite the "two-court rule", this Court, apparently to make sure that the public's natural feeling of abhorrence in time of war for persons accused of violation of the Selective Service Act shall not produce substantial miscarriage of justice, has reviewed such cases

on the facts. *Bartchy* v. *United States*, 319 U. S. 484, 485, 489.

2. Certiorari must be granted because of a conflict between circuits.

In this case, and in *O'Connell* v. *United States* (C. C. A. 2d 1942), 126 F. 2d 807, cert. denied *sub nom. Houlihan* v. *United States*, 316 U. S. 700, No. 1223, O. T. 1941, on which the court below relied (R. 146), it was held that no overt act need be pleaded in an indictment for conspiracy to violate § 11 of the Selective Training and Service Act of 1940.

In *United States* v. *Offutt* (1942), 75 App. D. C. 344, 127 F. 2d 336, it was held that pleading an overt act was an essential in an indictment for conspiracy to violate § 11 of the Selective Training and Service Act of 1940. (Syls. [1, 2], [7, 8]) [9], *passim*). The court specifically holds, 127 F. 2d at p. 340, that "To sustain these charges there must be proved, inter alia, an overt act."

It may be noted that the decision of the *Offutt* case intervened (April 13, 1942) between the date of the *O'Connell* decision (March 24, 1942) and the date the petition for certiorari in that case was filed in this Court (May 7, 1942). Neither party called the decision to the attention of this Court; in fact, both petitioner [8] and respondent [9] in that case represented—apparently in ignorance of the then-recent decision in the *Offutt* case—that there was no conflict.

It would be no distinction of the *Offutt* case to assert that there the prosecution was for a violation of Title 18, U. S. C. § 88, the general conspiracy statute, instead of for a viola-

[8] Petition for Certiorari, No. 1223, O. T. 1941, filed May 7, 1942, page 10.
[9] Brief in Opposition, No. 1223, O. T. 1941, filed May 27, 1942, page 8.

tion of the "conspiracy provision" [10] of § 11 of the Selective Training and Service Act of 1940 itself (50 U. S. C. App. § 311). For the two cases then could not subsist together unless (1) Congress would have power to provide for successive punishments of the same offense (conspiracy in each case), and unless (2) it be concluded that Congress in adopting § 11 of the Selective Training and Service Act of 1940 intended both (a) that the conspiracy provision therein should extend to all offenses denounced by the section, and also (b) that the general conspiracy statute at the same time should be applicable to all such offenses. There is no reason to believe even that Congress may have intended that a prosecutor should have the power of electing between these two statutes and their differing penalties (or in certain cases, of selecting among the provisions of these two statutes plus the Espionage Act [50 U. S. C. § 33, 34], and the Seditions Conspiracy Act [18 U. S. C. § 6]). It is felt that a proper review of the legislative history of § 11 of the Selective Training and Service Act will demonstrate that the words "or conspire to do so" contained in that section were intended to relate narrowly to the particular clause to which they were addressed (and which clause has no application to this prosecution), leaving the general conspiracy statute in full force as to all other matters. Both statutes would be given effect as thus construed together; and this construction is, of course, to be preferred

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[10] On the merits, it will be petitioners' contention that there is no provision of § 11 of the Selective Training and Service Act denouncing conspiracy to violate its terms other than the provision denouncing as criminals "any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so." Whether the final words "or conspire to do so", relate to the entire § 11, or only to violations contemplating force and violence, is one of the substantial matters to be disposed of on the merits in connection with the problem whether § 11 or 18 U. S. C. § 88 controls in this case.

in the interpretation of statutes. *United States* v. *Tynen*, 11 Wall. 88, 92.

There are other factors which induce the same conclusion, such as the fact that even in the decision of the Second Circuit in the *O'Connell* case it was recognized that the contrary and broader construction there adopted was doubtful, and the fact that the propriety of such broad construction was also doubted in the present case by the court below (R. 146) and by the District Court (R. 4). Such doubts ought to have been resolved in favor of holding applicable the provisions of 18 U. S. C. § 88 with its two-year-imprisonment term, rather than § 11 of the Selective Training and Service Act of 1940 with its five-year-imprisonment term. *United States* v. *Resnick*, 299 U. S. 207, 209.

In addition to the *Offutt* case, in the case of *United States* v. *Winter* (E. D. Pa., 1941), 38 F. Supp. 627, the prosecutor proceeded under 18 U. S. C. § 88. Since the conviction was there sustained under that statute, the case represents a further conflict with the decision below and in the *O'Connell* case as to the statute which applies.

Conclusion.

The writ should be granted.

Respectfully submitted,

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